No. ~~1259~~ 85

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES OF AMERICA, *Appellant*

v.

THIRD NATIONAL BANK IN NASHVILLE, NASHVILLE BANK AND TRUST COMPANY AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

MOTION TO AFFIRM OF APPELLEE, WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

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MOTION

The Comptroller of the Currency, William B. Camp, appellee, moves this Court, pursuant to Rule 16 of its Rules, that the judgment of the District Court for the Middle District of Tennessee be affirmed on the grounds

that the questions raised by the appellant are not properly presented on the record of this case, and that questions, properly presented herein, do not involve a substantial issue of law.

Question Presented

1. Whether, on the record of this case and the state of the case law and statutes applicable to this case, the District Court's conclusion that the merger was not anticompetitive is manifestly correct; or, on the basis of the findings of the District Court, there is substantial evidence supporting its conclusion, based on an independent examination of the record, that the probable convenience and needs of the community to be served by the institution resulting from the merger clearly outweighed any anticompetitive effect stemming from the elimination of a stagnant and floundering bank.

Statement

This case was one of three bank merger antitrust cases pending at the time of the passage of the Bank Merger Act of 1966 (80 Stat. 7) which were not immunized against charges of violation of Section 7 of the Clayton Act and Section 1 of the Sherman Act as a result of the new legislation.

This action was commenced on August 10, 1964 as a result of the agreement between the owners of Nashville Bank and Trust Company (NB&T) and Third Naitonal Bank in Nashville by which the former would be merged into the latter.

Under the terms of the Bank Merger Act of 1960, the Comptroller of the Currency was required to seek

advisory opinions from the Attorney General,[1] the Federal Reserve System, and the Federal Deposit Insurance Corporation as to the competitive effects of the merger only. Despite the unfavorable responses of the three agencies, none of which appear on the record of this case to have investigated the competitive situation in Nashville except from papers filed by the banks themselves, the Comptroller, who was required by the statute to consider such factors as management, future prospects, resources and convenience and needs, and whose office did, in fact, conduct an on-the-spot investigation of the Nashville situation, approved the merger. The Tennessee Superintendent of Banking, whose office had responsibility for the supervision and examination of NB&T, a State bank, advised the Comptroller that the merger would have no anticompetitive effect. (Findings No. 295, 296)

During the period between the transfer of ownership in January, 1964 of NB&T from Hill Grocery Company, a Nashville-based grocery chain which had held controlling interest in NB&T for almost thirty years, to non-bank investors known as the "Weaver group" and the subject merger's consummation on Au-

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[1] 12 U.S.C. 1828(c)

In the interests of uniform standards, before acting on a merger, consolidation, acquisition of assets, or assumption of liabilities, under this subsection, the agency (unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved) shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection (which report shall be furnished within thirty calendar days of the date on which it is requested, or within ten calendar days of such date if the requesting agency advises the Attorney General and the other two banking agencies that an emergency exists requiring expeditious action).

gust 14, 1964, NB&T was subjected to raids on its accounts and personnel; it lost its only full-time business development officer, who removed more than $2.5 million in savings and commercial accounts from it in a period of about sixty days. (Findings No. 126, 127) By August 18, 1964, the condition of NB&T was such that the District Court denied the motion of the Justice Department for a preliminary injunction and the merger was consummated on that date.

Prior to the trial of the case, the Bank Merger Act of 1966 was enacted into law.[2] This statute provided an affirmative defense to an allegation that a bank merger would have substantial anticompetitive effects[3] by providing that a showing that the probable convenience and needs of the community to be served could clearly outweigh any probable substantial anticompetitive effects which might stem therefrom.

The District Court decision in this case in no way conflicts with the *Houston* case. In *Houston,* this Court ruled solely on procedural issues, holding that the burden of proof as to convenience and needs rested upon the defendants; and that the Bank Merger Act's provision for a "review de novo"[4] requires the District Court to examine the facts independently and to make its own determination as to whether convenience and needs outweighed the anticompetitive effects, if any.

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[2] 12 U.S.C. 1828(c), as amended, was signed on February 21, 1966.

[3] *U.S.* v. *First City National Bank of Houston,* No. 914 and *U.S.* v. *Provident National Bank,* No. 972 (87 S. Ct. 1088 (1967)).

[4] 12 U.S.C. 1828(c)(7)(A).

The Proceedings

The Comptroller of the Currency intervened as a party in this action on February 28, 1966, as authorized by the Bank Merger Act of 1966.[5] The District Court was then urged, as was this Court in the *Houston*[6] and *Provident*[7] cases, to accord presumptive weight to the findings of the Comptroller relating to convenience and needs by applying the substantial evidence test. (TR 1-65) In the alternative, the District Court was urged to remand the case to the Comptroller for specific findings under the new Bank Merger Act. The Court refused to follow this procedure, maintaining that it was the Court's prerogative to assess the evidence, including the testimony of the Comptroller, and to make its own determinations. (The Comptroller subsequently testified and stated his conclusions as to the Bank Merger Acts tests.)

The District Court then proceeded to conduct the trial in the manner dictated by this Court in the *Houston*[8] and *Provident*[9] cases. The Justice Department was permitted to introduce, almost without limitation, all of the evidence it had related to concentration of banking resources and statistics pertaining to growth and size of NB&T and other Davidson County banks. The defendants and the intervenor were not allowed to cross-examine the appellant's witnesses on the question of convenience and needs.

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[5] 12 U.S.C. 1828(c)(7)(D).

[6] *Supra.*

[7] *Supra.*

[8] *Supra.*

[9] *Supra.*

At the conclusion of Justice's case, the defendants and the intervenor were required to bear the burden of proving that the benefits to the community exceeded the anticompetitive effect shown by Justice. Justice was then permitted rebuttal.

The extent of the District Court inquiry is best demonstrated by the record of the trial which lasted over six weeks, and which involved 3,800 pages of transcript and well over 600 exhibits. Post-trial briefs and proposed findings of facts and conclusions of law were filed by all parties.

On November 22, 1966, the Court filed an opinion[10] upholding the legality of the merger; on December 16, 1966, the Court entered 302 findings of fact and twelve conclusions of law.[11]

The Questions Presented by the Appellant Are Unsupported by the Record and Post No Substantial Question of Law Pertinent to the Record or Findings of the District Court in This Case

Before treating the two-part question presented herein by the appellee intervenor which will also dispose of appellant's question No. 1, it is necessary to discuss questions 2 and 3[12] posed by the appellant in its jurisdictional statement. The second such question posed to this Court queries:

> Whether, in such an action, the Court should make an independent determination of the merger's legality, or merely review the banking agency's determination to ascertain whether it is supported by substantial evidence.

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[10] J.S., App. A.

[11] J.S., App. B.

[12] J.S., p. 2.

A six-week trial was held in this case after the District Court specifically refused to be bound by the decision of the Comptroller of the Currency or his findings as described in the Opinion of the Comptroller in authorizing this merger or his testimony as a witness;[13] testimony fills some 3,800 pages of transcript, and well over 600 documents were introduced. The Court permitted each party to place into evidence every bit of relevant evidence and expert testimony it could muster. There is no indication by the appellant that all of the data and testimony available to it was not made available to the Court; and the experience of the banks and the Comptroller for the almost two years which elapsed from time of merger to the conclusion of the trial enabled the Court to study facts which, in many instances, did not exist prior to the merger's consummation.

After reviewing this mass of material the District Court held:

> The Court concludes that the Comptroller of the Currency's findings, made both before and after the passage of the 1966 Bank Merger Act, that the anticompetitive effects of the merger are minimal and that the merger is not violative of antitrust standards, is supported by the clear preponderance of the evidence in the record. *As the Court is also of this view independently of the Comptroller's findings,* it is unnecessary to inquire whether any anticompetitive effects are outweighed by the convenience and needs of the community. However, *the Court is of the opinion* the preponderance of the evidence supports the Comptroller's finding that the convenience and needs of the community and the public interest will be far better served by Third National Bank with the additional assets

[13] Appendix A.

> which it acquired as a result of the merger than would be the case by maintaining the Trust Company as a separate institution. [Emphasis supplied.][14]

In addition, the Court's Conclusions of Law, No. 6 through 11,[15] are nowhere related to agency findings, but are independent conclusions of the Court. They hold that the merger, on balance, was procompetitive; that it held no reasonable probability of substantially lessening competition or tending to create a monopoly; and that the anticompetitive effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the Nashville metropolitan area.

After making these findings, the Court, in a separate finding (No. 12),[16] held that the *preponderance* of the evidence (such evidence being substantial) supports the Comptroller's findings.

The fact that the District Court specifically stated that it had reached its own conclusions independently is sufficient to negate the validity of the appellant's second question. To hold otherwise would subject to attack every case in which the District Court, upon examining the evidence, arrived at a conclusion which happened to agree with the findings of the responsible agency. The plaintiff apparently contends that if a district court agrees with the agency, it is merely "reviewing" the findings; to be independent, the district court must disagree.

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[14] J.S., App. A, p. 53.

[15] J.S., App. B, pp. 122-123.

[16] *Id.*, p. 123.

This posture is not consistent with this Court's position in the *Houston* case, in which it held:

> The courts may find the Comptroller's reasons persuasive or well nigh conclusive. But it is the Court's judgment, not the Comptroller's, that finally determines whether the merger is legal.[17]

The appellees do not challenge this statement as is implied by the appellant's brief; we merely note that the Court below made its own study, arrived at its own findings (many of which, it should be noted, were not articulated in the Comptroller's opinion or in his testimony) based solely upon evidence before the Court; and rendered its own conclusions of law. That the findings of the Court included a finding that the preponderance of the evidence supported the more limited conclusions of the Comptroller is a rather insubstantial basis for a claim that the Court merely "reviewed" the Comptroller's record.

Appellant's question No. 2, therefore, is improperly before the Court; it is completely without justification in the record of this case; and does not offer a reason why the Court should accept jurisdiction. The legal issue has already been decided unanimously in *Houston*[18] and the District Court, despite the fact of trial and decision in Nashville before *Houston* was decided, anticipated and adhered fully to the procedural rules set down in this Court's opinion.

Question No. 3[19] posed by the appellant suggests that before a court may find a bank merger's anticompeti-

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[17] *U.S.* v. *First City National Bank of Houston*, Nos. 914 and 972, March 27, 1967, 87 S. Ct. 1088, 1093.

[18] *Supra.*

[19] J.S., p. 2.

tive effect clearly outweighed in the public interest by its probable effect in meeting the convenience and needs of the community to be served, it must first find that there is no less anticompetitive means to achieve the same benefits.

The justification for this position is tenuous at best. The facts of the case and findings of the Court below, which are uncontradicted by any evidence in the record of the trial, are that control of NB&T was purchased in January, 1964 by William C. Weaver and a group of associates as a long term investment. The group had no intention of becoming active in the management of the bank. (Finding No. 119) There is no evidence in the record which challenges this finding.

In February, 1964, officials of the third largest bank in Nashville, Commerce Union Bank, held conversations with Weaver regarding a merger of NB&T, but the discussions were soon terminated. (Finding No. 120)

Before Weaver began to discuss merger of NB&T with Third National Bank, NB&T lost, by resignation, two of its major sources of business, H. G. Hill, its chairman, and Kirby Primm, the only full-time new business development officer. The age of the directors and officers, the loss of Primm, Hill and Thweatt, another director allied with the Hill interests, the impending loss of its ailing President, and the other major problems besetting NB&T presented an almost insoluble problem to the owners unless resort was had to a merger. (Findings No. 131, 132-143) A satisfactory agreement was reached and the merger was consummated.

As authority for its proposition that a less anticompetitive solution to NB&T's problems should have been

found, appellant cites no facts which indicate any possibility of sale to or merger with any other investors or institutions except Commerce Union Bank. However, if as alleged by the appellant, the concentration of banking resources among the three largest banks in Nashville (including Commerce Union) which resulted from the merger is illegal, it is difficult to understand the appellant's advocacy of an alternative or "less anticompetitive" solution which would result in the identical degree of concentration.

This case does not involve the question where merger or sale to a purchaser other than a "competitive bank" would be preferable, as appellant avers, if such a purchaser "were ready, willing, and able to acquire the bank with management problems",[20] in citing Rep. Reuss and others. But, the record of this case amply demonstrates that NB&T did not compete with the larger Nashville banks. If anything, it was assisted and supported by them. (Findings No. 236, 237, 238, 239, 243, 244, 245) No such purchaser was shown to have been "ready, willing and able." Indeed, no prospective purchaser of any sort was even shown to exist.

Even attributing a degree of competitiveness to NB&T which is not apparent in the record, the plaintiff's proposition must fail. No banks in Nashville other than the largest three were in a position to acquire this deteriorating institution. Tennessee law prohibits branching across county lines,[21] thus excluding the possibility of a non-Nashville bank assuming the responsibility; no other investor evinced an interest in

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[20] J.S., p. 20.

[21] A "grandfather clause" permits Commerce Union to retain pre-existing branches in the counties surrounding Nashville.

so doing, and the appellant introduced no evidence that such an investor ever existed.

Under the circumstances of this case, the appellant's proposition can only be considered as based upon a speculation devoid of any factual basis. It is not a proper issue to be brought before this Court, for it finds no factual support on the findings of this case or on the record of the District Court, and has no basis in statute, legislative history or law; nor does the jurisdictional statement contain any relevant citations thereto.

As noted in *International Shoe Co.* v. *FTC*, 280 U.S. 291, 301 (1930):

> It was suggested by the Court below, and also here in argument, that instead of an outright sale, any one of several alternatives might have been adopted which would have saved the property and preserved competition; but it seems to us, all of these may be dismissed as lying wholly within the realm of speculation. . . . [N]o one is wise enough to predict with any degree of certainty whether such a course [alternative] would have meant ultimate recovery or final and complete collapse.

We submit that the foregoing is fully applicable to the instant case.

The Competitive Standard

The appellant's first question is "whether the court, in deciding whether the effect of a merger may be substantially to lessen competition within the meaning of the Bank Merger Act of 1966, should apply the standards that this Court has announced in interpreting the identical words as they appear in Section 7 of the Clayton Act."

The appellee, Comptroller of the Currency, agrees with the basic position taken by the appellee banks in their motion to affirm, and adopts the argument contained therein that the question of competitive standards is not necessary to a determination by this Court to affirm. A review of the findings of the District Court demonstrates conclusively that, regardless of the language employed by the Court in its opinion,[22] there were sufficient facts developed in the record to support its conclusion that the benefits of the merger to the community far outweighed the anticompetitive effect, if any, of the merger.

However, it is clear that the evidence and findings supporting the appellant's position on the alleged anticompetitive effects of the merger relate only to a formalistic statistical approach to the question of competition. It is the position of the appellee, an intervening party in this action, that this Court has never substituted, as an immutable rule in either Section 1 Sherman or Section 7 Clayton Act cases, a percentage formula to be followed to the total exclusion of other factors relating to the competitive ability of the merging parties. Accordingly, the appellee Intervenor submits that the first question submitted by the appellant poses no substantial issue of law; and, consequently, the questions posed by this motion should be answered in the affirmative and the judgment of the District Court affirmed.

The Competitive Test

We submit that the cases relied upon by the appellant to support its position that mere percentages are sufficient to establish an irrefutable presumption of

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[22] J.S., App. A.

illegality do not, in fact, so hold; and, we submit that the findings of the District Court relating to competition in Nashville and the ability to compete of NB&T would be sufficient to support the conclusion that this merger does not violate the most rigid standards heretofore adopted by this Court in its Clayton Act cases *even in the absence of the preponderance of evidence on the convenience and needs side of the balancing test called for in the Bank Merger Act.* We submit further that the Bank Merger Act of 1966 and its legislative history make it manifest that the District Court was correct in considering the capacity of the bank to compete as well as percentages of concentration in assessing the competitive effect of this merger.

ARGUMENT

The poverty of the appellant's argument in regard to the anticompetitive effects of this merger becomes apparent in a review of its jurisdictional statement. Except on page 18 therein, no anticompetitive allegations are made. The sole contention of the appellant is that the merged bank controlled 40 per cent of loans in the relevant market[23] (its portion of assets and deposits were lower) and that the combination of the three largest banks increased its share of the same restricted (loan only) market from 94 per cent to 98 per cent. This is not surprising, however, when the record

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[23] In the event further proceedings in this Court are required, we reserve the right to dispute the District Court's limitation of the relevant market to "commercial banking" and the geographic area to Davidson County. However, the record relating to competition and to convenience and needs is so overwhelming in this case, as decided, that it is unnecessary to raise this issue in a motion to affirm.

has no other substantial or unqualified evidence to support an allegation of anticompetitive effect.

U. S. v. *Philadelphia National Bank,* 374 U.S. 321 (1963), is cited to support the appellant's position that an increase in concentration is inherently suspect if a single bank controls more than 30 per cent of a market.

In *Philadelphia,* however, the increase in concentration within the banking community was of serious concern to the Court and formed a necessary backdrop to its ruling. The two banks involved in that merger had a total of fifteen prior mergers in 12 years; and the number of banks in the city declined from 108 to 42 in a fifteen-year period. Finally, the *PNB-Girard* merger resulted in a 33 per cent increase in concentration between the largest banks.

In both the *Pabst*[24] and *Von's Grocery*[25] cases, relied upon by the appellant, this Court was similarly concerned with a trend toward rapid concentration of the brewing and retail grocery industries through merger.

Compare this with Nashville. Neither of the two banks involved were involved in a merger in more than thirty years; Third National had no prior merger, and NB&T was, in effect, spun off from control of First American National during the depression era.

The Nashville banking community had no merger history; the only merger in more than 14 years preceding this merger was the consolidation of a subsidiary with its parent in 1962.[26] Nashville has as many independent banks today as it had in 1950.

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[24] *U.S.* v. *Pabst Brewing Co.,* 384 U.S. 546.

[25] *U.S.* v. *Von's Grocery Co.,* 384 U.S. 270.

[26] Commerce Union absorbed Broadway National.

Rather than a 33 per cent increase in the concentration of banking resources, the merger increased such concentration among the three larger banks in Nashville by less than 5 per cent, regardless of the base used to compute such percentages.

Philadelphia,[27] moreover, did not eliminate defenses designed to show a lack of anticompetitive effect of a given merger; indeed, it suggests that even under the traditional tests of Section 7, without the modifications inherent in the Bank Merger Act of 1966, such factors as management problems,[28] and unsound banking conditions[29] could well be considered by the Court as defenses to a Section 7 action.

We respectfully submit that the findings of the District Court are sufficient to justify this merger as noncompetitive, particularly in view of the almost total absence of a bank merger history in Nashville (or Tennessee) and the improbability of any further consolidations within the area delineated by the Court for purposes of this case.

Effect of the Bank Merger Act of 1966

The District Court noted that the language of the Bank Merger Act of 1966 required both the responsible banking agency and the courts to consider factors *other* than concentration when considering the anticompetitive effect of a merger. Accordingly, it referred to the factors set forth in *Columbia Steel*:[30]

> . . . we do not think that the dollar volume is in itself of compelling significance; we look rather to

[27] *Supra,* at p. 363.

[28] *Supra,* at p. 372.

[29] *Supra,* p. 372, n. 46.

[30] *U.S.* v. *Columbia Steel Co.,* 344 U.S. 495, 527.

> the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or an intent to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market.
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> * * * * *
>
> The relative effect of percentage command of a market varies with the setting in which that factor is placed.

The opinion of the District Court, appended to the Jurisdictional Statement, logically and correctly applied these criteria to the facts in the instant case, and its reasoning need not be repeated here.

Although *Columbia Steel*[31] was commented upon by this Court in the *Lexington* case,[32] it cannot be maintained that it was overruled. Despite the seemingly inflexible rule relating to the merger of two "major competitive factors", the rule was articulated only after the recitation of the aforementioned factors and the conclusion, at p. 672:

> In the present case, all those factors clearly point the other way.

The Bank Merger Act of 1966 provides, in section (5)(B), after directing a balancing test between anticompetitive effect and convenience and needs, as follows:

> In every case, the responsible agency shall take into consideration the financial and managerial re-

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[31] *Supra.*

[32] *U.S.* v. *First National Bank & Trust Company of Lexington,* 376 U.S. 665.

> sources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

and, in paragraph (7)(B):

> . . . the standards applied by the Court shall be identical with those that the banking agencies are directed to apply under paragraph (5)(B).

The inclusion of this language in (5)(B) is clearly to distinguish "convenience and needs" as a competitive factor and "convenience and needs" as a device to measure the additional service and benefits to be rendered to the community as a result of the merger. Unquestionably, the consideration of factors such as managerial resources involves a consideration of the ability or capacity of a bank to compete and is necessary to a valid antitrust analysis.

During the consideration of new bank merger legislation by the Congress, moreover, the Department of Justice advised Congress of its willingness to subscribe to the use of the various banking standards in determining the effect of a bank merger upon competition, rather than to rely upon mere concentration percentages. This is demonstrated in a proposed revision of subsection (5) of H.R. 11011[33] which was submitted by the Attorney General to Congressman Reuss in a letter dated January 5, 1966.[34] The proposed revision retained the Ashley-Ottinger provision that the courts and agencies should apply identical standards; and it further directed that such items as the financial history and condition of the banks, the adequacy of their capital

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[33] This is commonly referred to as the "Ashley-Ottinger Bill."

[34] Appendix B.

structure, and future earnings prospects, and the general character of their management, should be taken into account by the banking agency *"in determining the effect upon competition . . . ."* It is application of this concept, subscribed to by the Department of Justice, the appellant herein, which fully justifies the utilization by the District Court of the criteria employed in its consideration of this case.

We respectfully submit that the findings of the District Court in this case conclusively demonstrate that NB&T was not a major or substantial competitor in the Nashville banking market; and that these findings were based upon a preponderance of evidence, almost all of which was factually uncontradicted at trial by the plaintiff; that there has been an increase in the vigor of bank competition in Nashville as a result of the merger; and that the findings as to competition were fully consonant with the case law and statutes governing bank mergers; and, accordingly, it is manifest that no substantial issue of law is raised by the jurisdictional statement of the appellant.

The Competitive Setting

The Motion to Affirm submitted by the appellee banks details the essential findings of facts which relate particularly to the "convenience and needs" factor. As we adopt the factual presentation of the appellee banks, the facts need not be repeated here, except insofar as is necessary to demonstrate the inherent non-competitiveness of NB&T. The lower court's findings make it clear that the community can only be better served by the increased utilization of assets taken over by Third National, together with the sounder banking practices and additional benefits provided by it; many of the

same findings, moreover, demonstrate conclusively that NB&T could not have been a serious competitor to Third National or to other Nashville institutions either at the time of the merger or in the foreseeable future; and there is no reasonable probability that competitors or competition will be harmed as a result of the merger.

The following facts, as found by the Court, demonstrate the non-competitiveness of NB&T.

1. Evidence in this case is overwhelming that the growth of NB&T, statistically, was due to the efforts of Messrs, Hill, Hackworth and Primm. (Findings No. 115, 126, 132)

2. Subsequent to the sale of NB&T by the Hill Company, a Nashville-based grocery company, H. G. Hill, Jr., Chairman of the Board, and another director resigned from the Board of Directors of NB&T. Some 30 per cent of the deposits of NB&T were due to the Hill interest in the bank. (Findings No. 116, 127, 128, 131, 132)

3. As previously indicated, NB&T's only full-time new business development officer (Kirby Primm) accepted a position with the largest bank in Nashville, bringing with him in a very brief period more than $2.5 million in deposits from NB&T. (Finding No. 126)

4. The president of NB&T, W. S. Hackworth, was 68 years of age at the time of the merger, was in ill health and is now deceased. It is substantially uncontradicted in the record that Hackworth's unique position in Nashville rendered him almost indispensable to the bank. (Findings No. 115, 129, 130, 131, 132, 142)

5. Although NB&T grew substantially during the early years of Hackworth's presidency (1956-1960), its rate of growth declined thereafter and did not keep pace with the growth of the community. From June, 1960 to June, 1964, NB&T was the only bank in Davidson County to show an absolute decline in IPC demand deposits (checking accounts of individuals, partnerships and corporations). (Findings No. 133, 134, 228, 229)

6. There was no adequate replacement available for the president of the bank within the bank. Of six departmental heads, four were 65 or over and the other two were 59 years of age. The only officers who might be reasonably considered to succeed the president had little or no experience in commercial banking, having been confined to trust matters. (Findings No. 130, 131, 132, 140, 141, 142, 143)

7. The ultimate test of the effective capacity and competition offered by any commercial bank in its ability in the commercial lending area. NB&T, because of a lack of a credit department, could not and did not engage seriously in commercial lending. It had no competitive lending know-how and it lacked the aggressiveness to compete. (Findings No. 248, 249, 283, 284)

8. Outside of its trust department, NB&T had only one officer under the age of 40 who was a college graduate. (Finding No. 143)

9. Trust business is responsible for an insignificant portion of the net income of a commercial bank. Actual competition for trust business between banks is minimal. For example, in 1963 all Nashville banks combined received less than 8 per cent of a total of 871 appointments made in probate court during that year. (Findings No. 146, 148)

10. NB&T had only one branch in an extensive branching area. The absence of such branches is a handicap in the competition for or solicitation of trust business. (Finding No. 149)

11. Many of the deposits with NB&T were complimentary accounts of corporations which maintained their primary accounts in larger banks. (Findings No. 163, 164) NB&T itself maintained accounts in each of the three largest banks in Nashville. (Finding No. 167) Banks do not ordinarily compete with smaller correspondent banks and such calls as larger banks make upon customers of smaller banks are courtesy calls. (Finding No. 166) The maintenance of the aforementioned accounts by NB&T was a deterrent to competition by these banks with NB&T. (Finding No. 167)

12. NB&T was the only commercial bank in Davidson County specializing in mortgage loans. At the end of 1963, real estate loans constituted less than 1 per cent of the loans of Third National but constituted 35 per cent of the total loans of NB&T. As to commercial banks, such loans are frozen assets, less stimulating to the economy than short term commercial loans. (Finding No. 169)

13. The ratio of total loans to total assets of NB&T was consistently lower than that of the three largest banks in Nashville. This lower ratio demonstrates that NB&T was not exerting its best efforts to meet the credit needs of the community. (Findings No. 171, 172)

14. NB&T had no credit department. Such department is necessary to operate a competitive commercial bank. (Finding No. 175)

15. NB&T did not have adequate branch banks; its bookkeeping, accounting and auditing procedures were inadequate and obsolete. These omissions are substantial competitive handicaps. (Findings No. 176, 177, 179).

16. The Nashville market is such that a failure of a bank located in the area to engage in correspondent banking demonstrates a lack of determination to do its job. Failure to compete in this area places a bank at a distinct competitive disadvantage. (Finding No. 101) NB&T could have competed in the correspondent banking field but failed to do so. This failure precluded NB&T from being considered a major competitor in the Nashville market. (Findings No. 102, 103, 104, 105)

17. The plaintiff's own statistics and the testimony of its economist demonstrate the decrease in growth rate of NB&T as compared with other Nashville banks between the periods June, 1956 to June, 1960 and June, 1960 to June, 1964. These differences are reflected in the following table: (Findings No. 229, 230-234, 238, 239, 246, 247, 248, 249, 283, 284, 285)

	Assets	Loans	Deposits	IPC Demand Deposits
Nashville Bank & Trust	—26.23	—47.71	—31.81	*—63.17
Third National Bank	+24.57	+ 9.51	+21.08	—19.47
First American	+21.54	— 8.79	+24.89	— 2.50
Commerce Union	+ 8.25	+ 2.87	+12.94	+11.84
All other banks in Nashville	+18.11	+10.93	+21.36	+18.81

(Capital City excluded as it was not in existence in base period 1955-1960)

* NB&T was the only Nashville bank to show a dollar decrease in this category.

There is no evidence in the record of this case, oral or documentary, emanating from anyone having a personal familiarity with the Nashville banking market, that the elimination of NB&T from the scene has had an anticompetitive effect. To the contrary, the overwhelming preponderance of testimony of witnesses, whether for the appellant or the appellees, indicated that competition has been more vigorous since the consummation of the merger. (Findings No. 189, 190)

Condition of NB&T

In addition to the facts presented in the foregoing section, the District Court made findings which related to the performance of NB&T and in some instances compared this performance to that of Third National, the surviving bank.

In the years prior to the merger with Third National Bank, NB&T was a state chartered institution, insured by the Federal Deposit Insurance Corporation. As such, supervision and examination of the bank were joint responsibilities of the FDIC and the Superintendent of Banking for the State of Tennessee. Detailed examinations were performed on an annual basis and the Court was presented with the FDIC examination reports for the last four years of NB&T's existence. The reports were divided into two sections, (1) commercial banking and (2) trust department.

In the course of an examination of a bank, an examiner reviews all of the loans and investments held in a bank's portfolio and categorizes those which are deficient because of lack of adequate information, insufficient collateral, insufficient probability of payment or other factors into three groups: substandard, doubtful or loss. At the conclusion of the examination the

classified figures may be cited as a percentage of assets, or as a percentage of capital. In this case the evidence demonstrated both. For comparative purposes, the average classification rate of all national banks in Tennessee at the time of their examination closest to August, 1964 was 1.43 per cent. At the same time, Third National Bank's rate was .6 per cent, a substantially better performance. NB&T's rate was 6.9 per cent. (Finding No. 271) In 1960, classified loans at NB&T amounted to 3.4 per cent of its total loans. This figure increased slightly in 1961 but in 1962 it jumped to 7.3 per cent and fell back slightly in 1963. Classified assets as a percentage of capital structure of NB&T increased from 15 per cent in 1960 to 27 per cent in 1963. (Finding No. 276) This is an indication of timidity on the part of management at best; weakness and ineptness at the worst. This increase compares with a decrease at Third National during the same period from 13.7 per cent to 4.5 per cent. (Finding No. 276) Although NB&T was rated as "satisfactory" in 1960 and 1961 examinations, its condition by 1962 had deteriorated to the extent that its classification was changed to "fair". (Finding No. 277) By November, 1963, there had been no improvement in the criticized lending practices of NB&T and the slight reduction in previously criticized loans had been largely offset by the addition of previously unclassified paper, and further advances in newly extended credit. The rating in the institution remained "fair."

Although NB&T's trust department was generally considered good in the community by those not familiar with its internal operations, the Court found that the department had been specifically criticized by FDIC examiners in each of the reports on its performance

during the four years prior to the merger. The record shows and the Court found that, on personal trusts, contingent liabilities existed because of the speculative investments which NB&T permitted to be placed into an account by principals of a cemetery association. The later reports (1962) indicated that the involvement had grown worse. (Finding No. 153) Despite the promises of management that speculative investments would be replaced with orthodox investments, the decision was not implemented and, to the contrary, other speculative investments were knowingly permitted by NB&T. One account had received no income on the criticized speculative investments since its inception, and the vice-president in charge of the trust department was accused by the FDIC examiners of being remiss in providing basic procedures necessary for a prudent operation. (Finding No. 154) The potential losses continued between 1962 and 1963 and at the time of the last report the potential losses and contingent liabilities in the trust department were at unwarrantedly high levels. (Finding No. 155) In addition, NB&T had no audit controls over its trust department. This, from a regulatory agency's viewpoint, is a highly hazardous condition and it was found to be so by the Court. (Finding No. 156)

In another trust, the cemetery association withheld, with the knowledge of NB&T, almost $70,000 of perpetual care proceeds from the trust as required by Tennessee statute.

In addition to the poor performance record and the severe criticisms of NB&T for its acquiescence in violation of the law together with the competitive handicaps noted before, a regulatory agency could also be concerned with the fact that salaries being paid by NB&T to its employees were lower than those paid by the

three larger banks and indeed lower than those paid by all of the smaller banks in Davidson County. The inadequacy of salaries to bank personnel constitutes an invitation to embezzlement and defalcation. From the agency viewpoint, based upon the independent findings of the Court, NB&T was a bank on the verge of serious operational difficulties. Had the pattern continued, there is little question that the bank would ultimately have deteriorated to a position of immediate danger to its continuance as a financial institution.

The foregoing facts, which are but a few of those in similar vein established in the trial of this case, fully justify the District Court's conclusion, on the basis of law and statute, that the merger of NB&T could not have had a probable or immediate anticompetitive effect. It can only be a tribute to the sound judgment of the court below that the appellant was reluctant to rest on its first question and it is an indictment of the insubstantiality of this appeal that the bases of the other two questions are nowhere to be found in the record of this case, but constitute instead a transparent attempt to persuade this Court to go far beyond the facts in order to accommodate the appellant's far-reaching speculations.

Convenience and Needs

The appellee intervenor agrees with the basic position taken by the appellee banks in their Motion to Affirm, that on the basis of the District Court's independent finding that the anticompetitive effects of the merger were clearly outweighed in the public interest by the probable effect of the merger in meeting the convenience and needs of the community to be served; we subscribe to the basic position expressed in the appellee's brief and adopt it in lieu of repeating it herein.

Conclusion

For the reasons stated herein, the judgment of the District Court should be affirmed on the basis of the present state of the case law and statutes involved. There is no substantial issue raised by the Court's independent findings, on the record of this case, that the merger of NB&T into Third National would not result in the reasonable probability of a substantial lessening of competition or tendency to monopoly; or that such anticompetitive effects, if any, as appear in the record were clearly outweighed in the public interest by the probable effect of the merger in meeting the convenience and needs of the community to be served.

Respectfully submitted,

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Office of the Comptroller of the Currency

APPENDIX A

Decision of Comptroller of the Currency James J. Saxon on the Application to Merge Third National Bank in Nashville, Nashville, Tennessee, and Nashville Bank and Trust Company, Nashville, Tennessee

STATEMENT

On April 27, 1964, the $341.7 million Third National Bank in Nashville, Nashville, Tennessee, and the $45.9 million Nashville Bank and Trust Company, Nashville, Tennessee, applied to the Comptroller of the Currency for permission to merge under the charter and with the title of the former.

Nashville, in the heart of the TVA service area, is the state capital of Tennessee. With an estimated metropolitan population in excess of 400,000 persons, reflecting a 24 per cent increase since 1950, Nashville's population growth compares most favorably with the 5 per cent increase in population of the neighboring states of Alabama, Kentucky, Mississippi and the rest of Tennessee, which Nashville serves. The city is the focal point of a community constituting eight counties whose residents are dependent upon Nashville for such necessities as shopping, employment and medical care. Its wholesale trade area stretches across middle Tennessee into southern Kentucky, northern Alabama and northern Mississippi and contains an estimated population of 2,265,800 persons. This area, which bridges the North and the South of our country, enjoys a diversified economy dependent on agriculture, industry and commerce. The growth of this economy has been spurred by the availability of abundant and cheap electric power from TVA, and by such U.S. Government installations as Redstone Arsenal at Huntsville, Alabama, and the Arnold Development Center at Tullahoma, Tennessee. The availability of low-cost labor, cheap power, excellent transportation facilities by air, highway and rail, gas and petroleum pipe lines, and

an abundant water supply favors Nashville's role as a center of the burgeoning mid-South.

The charter bank, founded in 1927, has grown, through capable and aggressive management, into a system having 14 branch offices. It is particularly active in the correspondent banking field and now has a substantial number of correspondent banks, most of which are located within a radius of 250 miles. Within this region it competes vigorously with the large banks in northeastern Georgia, northern Alabama, western North Carolina, Kentucky and Tennessee, although holding only 3.13 per cent of total regional loans and deposits. Within the Nashville wholesale trade area, which covers middle Tennessee, southern Kentucky, northern Mississippi and northern Alabama, the charter bank's share of total bank loans and deposits is but 12.5 per cent. In the Nashville community, which consists of the city and eight surrounding counties, the charter bank hold about 29.7 per cent of deposits while its closest competitors, the $393.3 million First American National Bank, Nashville, and the $217.4 million Commerce Union Bank, Nashville, hold 34.9 per cent and 18.1 per cent of deposits, respectively.

The merging bank, chartered in 1889 as a trust company, passed through a merger and reorganization and emerged in 1956 with its present title. In 1959 the bank opened its first and only branch. Prior to January 1964, it was controlled by a wholesale grocery firm, which sold its stock in the merging bank to a syndicate controlled by insurance interests. The new owners soon found that injection of a substantial amount of capital and effort would be required both to make the bank a competitor in the Nashville area and a profitable undertaking for the owners. Having no desired to divert their attention from the insurance field and being unwilling to put large sums into the bank, these interests gave consideration to the merger route for a solution. They were prompted in part by the fact that, during

the period since assuming control, deposits in the merging bank declined from $45.4 million to $39.6 million, despite an increase of $1.1 million in public fund deposits. By contrast, deposits in the other three banks in the city rose sharply after 1960 and continued to rise. Many of the merging bank's customers, who previously felt obligated to maintain deposits in the bank because of their business connections with the previous owners, the wholesale grocery firm, indicated that they were then free to move their accounts to larger banks. Additionally, the change of ownership resulted in a substantial loss of accounts in the bank's trust department.

One of the most determinative factors in the consideration of this merger is the problem of management succession. This Office has stated time and again that a bank is only as good as its management. In the case of the merging bank, the president is ill and anxious to retire. Further, there is no provision for succession. The dearth of young management personnel and the unlikelihood of attracting new employees to the merging bank is due to the below-average salary scale and the lack of an adequate pension plan. The present owners of the bank show no intention of instituting costly reforms to attract employees capable of making the bank a vigorous competitor, responsive to the needs of the community. As a result, the merging bank is presently non-competitive. Only through merger with the charter bank, where the resulting bank will be a National Bank, will this Office have an opportunity to assist this non-competitive state-chartered institution as well as the people of the Nashville community. We would, indeed, be derelict in our responsibilities to protect the public interest in banking were we to impede effective management from assuming the responsibilities of a declining and leaderless merging bank.

We turn now to the future earnings prospects of the applicant banks, another criterion established by law in

the consideration of bank mergers. The future earnings prospects of the merging bank, in its present condition, are very gloomy. The recent substantial decline in deposits and the phlegmatic and incapacitated management bode ill for future earnings of the bank unless remedial steps are taken. If merger is the remedy, however, as we are convinced it is, the future earnings prospects of the resulting bank are excellent because of the dynamic management, existing branching system and operating efficiency of the charter bank.

Only minimal competition exists between the two applicant banks due to difference in size and to diversity of market interests. As stated above, the charter bank serves numerous correspondent banks throughout its region. These correspondent banks' deposits account for 18.7 per cent of the charter bank's deposits, as compared to the merging bank's correspondent deposits which amount to only 1.2 per cent of the merging bank's deposits. Commercial loans make up 40 per cent of the charter bank's total loans, but only 25.7 per cent of the merging bank's total loans. Further contrast can be seen in the fact that, while real estate loans account for only 0.8 per cent of the charter bank's loans, such loans constitute 34 per cent of the merging bank's loans.

While the cold statistics presented by the application may indicate at first blush that some competition now exists between the applicants and that it will be eliminated by this merger, closer analysis of the complete picture dispels this hasty conclusion. A bank's competitive force in its community depends greatly upon the attitude of its management and board of directors. To assess accurately competition between two banks, an effort must be made to weigh the aggressiveness, the capability, the experience and the desire of the management of each to compete. When, as in this case, we find that the management of the merging bank is more interested in insurance than in

banking, has no desire to maintain the bank's relative standing in the banking community, and has made no effort to improve its internal operating procedures nor elevate the morale of its personnel through better salaries and an improved pension plan, we cannot realistically view it as a competitive bank. When a bank, such as the merging bank, is not disposed to compete, it is idle to speak of the elimination of competition by reason of a merger.

The hallmark of modern banking is branch competition. The inability of the merging bank to effectively serve the public is graphically illustrated in its failure to develop a modern branching system despite the fact that it was founded in 1889. With the three largest banks in Nashville having 20, 15, and 20 offices, respectively, it is manifest that Nashville Bank and Trust Company, with a single branch, cannot compete in the important area of branching.

The competition for funds in the Nashville community is not confined to commercial banks. It must be noted that savings and loan associations are particularly strong competitors. While competition is most desirable and indeed a basic tenet of the American economic system, the advantages to savings and loan associations arising from higher permissible interest and dividend rates, as well as tax privileges not available to commercial banks, make a difficult competitive situation for the banks. This fact is reflected in the 325 per cent increase in savings and loan share accounts in the Nashville community since 1953 and the opening of three new savings and loan association branches during the past year. There is certainly a need for a stronger institution to compete for funds in such a market.

There is no tendency toward monopoly in the Nashville area or community. The charter bank has never been involved in a merger since its founding in 1927; its rapid growth has been internal. The number of Nashville banks has not declined during the past 30 years. Indeed, a

relatively new bank, the Capital City Bank, which was chartered in 1960, now has almost $7.5 million in resources and two branches. There is hardly a monopoly when a new bank can enter the market and prosper so remarkably in such a short time.

One of the best qualified authorities on banking in Tennessee has recognized the fact that the merger will be a salutary development. In a letter of April 25, 1964, Mr. M. A. Bryan, Superintendent of Banks, State of Tennessee, said of the proposed merger:

The competitive factor in my opinion will not be lessened by the merger. This assumption is based on the evident competition which now and will exist between existing First American National Bank, largest Nashville bank, The Commerce Union Bank, in third position, and Third National Bank, second in size, the surviving institution of the merger between themselves and Nashville Bank and Trust Company which holds a minor position in the field insofar as competition is concerned.

Consummation of the proposed merger will improve the charter bank's ability to serve the convenience and needs of the Nashville public. It will be better able to meet the credit needs of its larger customers throughout the Nashville wholesale trade area. Automation will improve the operating efficiency for the benefit of the merging bank's customers. Increased salaries and other incentives such as the charter bank's pension plan will improve the morale of the merging bank's personnel. The more numerous banking services offered through the resulting bank's extensive branch system will better serve the needs of the merging bank's customers. Further, the assets of the merging bank will be pooled with those of the charter bank to be used more efficiently in promoting the economic well-being of the people of the Nashville community, the wholesale trade area which it serves, and the mid-South region of which it is the center.

In the light of all of the facts and circumstances here present, we are compelled to conclude that this merger application has met the statutory criteria and will promote the public interest. The application is therefore approved.

JAMES J. SAXON
James J. Saxon
Comptroller of the Currency

Dated: August 4, 1964

APPENDIX B

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., January 5, 1966.

Hon. HENRY S. REUSS,
Houst of Representatives, Washington, D.C.

DEAR CONGRESSMAN: Confirming oral discussions between you and my staff, I am responding to your letter of October 20, 1965, in which you requested my comments and suggestions with respect to proposals offered by yourself and by Messrs. Ashley and Ottinger to achieve uniformity of standards to be followed by the banking agencies, the Department of Justice and the courts in reviewing bank mergers. Your letter and your subsequent assistance were very helpful to us in our further consideration of the matters involved in the proposed legislation. To meet the problems suggested by your letter and certain other difficulties, we have drafted the attached revision of subsections (5) and (7) of the Ashley-Ottinger bill. I believe that the proposed revision accurately states the standards which Congress, in the Bank Merger Act of 1960, directed the banking agencies to apply in passing on bank merger. In amplifying in detail the position outlined in my letter of September 24, 1965, to the chairman of the House Banking and Currency Committee, the proposed revision clarifies some of the possible ambiguities that that letter may have contained.

As you have pointed out in your letter, my letter of September 24, 1965, to Chairman Patman commented favorably on the objective of providing uniformity of standards for bank mergers; and, as I stated, I have no objection to making it clear by statute that the standards applied by the courts should be identical to those which the banking agencies are directed to apply by the Bank Merger Act.

My views in this regard, however, as stated in my September 24, 1965, letter, stem from the premise that the

appearance of conflicting standards is undesirable, particularly where it is felt by the industry to be a substantial problem, and not because of any belief that the standards specified in the Bank Merger Act and those applied by the courts are, in fact, significantly different. I should like to repeat here my strong belief that the differences, if any, in the standards applied to bank mergers by the courts and the standards applied by the agencies have been overstated. Therefore, it is vitally important in my view that any legislation aimed at achieving uniformity of standards should not, by inadvertent language, create entirely new and untested standards in this field. The analysis in your letter of October 20, 1965, illustrates, however, that it has been very difficult to draft statutory language creating uniform standards without also modifying existing law in undersirable ways.

For example, as you point out, the Ashley-Ottinger proposal could be reasonably interpreted to permit the regulatory agencies and the courts to approve a merger that violates the Sherman Act. This would effect a substantial change in current law, for as is clearly indicated by the legislative history of the Bank Merger Act, that act was not intended to affect in any way the applicability of the Sherman Act to bank mergers.

Moreover, according to the Ashley report of October 19, 1965, the proposal "would change the present standards for the consideration of bank mergers" and would provide "in effect, that the general principle that substantially anticompetitive mergers are absolutely prohibited is to be modified in the case of banks to the extent that a 'merger transaction which tends to lessen competition may be approved where the probable adverse competitive effect thereof is clearly outweighed in the public interest by the probable effect of such transaction in meeting the convenience and needs of the community to be served'." In thus permitting the single factor of "convenience and needs" to

override all other considerations, the proposal goes far beyond the desirable objective of achieving uniformity in the review of bank mergers by means of a direction to the courts and agencies to take into account all of the standards of the Bank Merger Act, and does not accord with my view that a substantive change in existing law is neither necessary nor appropriate.

As you know, we also had some difficulties with your bill, again largely stemming from the fact that it incorporated novel tests that would create new uncertainties in this area of the law and might lead to a substantial modification of antitrust principles, although this was clearly not your intent. I understand that my staff has reviewed the proposed revision of subsections (5) and (7) of the Ashley-Ottinger bill which I am enclosing herewith, and that you are agreeable to the proposed revision.

I believe that the proposed revision does not conflict in any way with the views expressed by Secretary Fowler in his letter to you of January 3. In my opinion, the proposed revision accurately reflects the present law applicable to bank mergers, and with the exception which I shall shortly note, I would be agreeable to the Ashley-Ottinger bill if revised as indicated.

The exception concerns section 2(a) of the Ashley-Ottinger bill. For the reasons set forth in my testimony and in my letter of September 24, 1965, I remain opposed to this or any similar provision.

Sincerely,

NICHOLAS DEB. KATZENBACH,
Attorney General.

DRAFT REVISION OF SUBSECTIONS (5) AND (7) OF S. 1698, AS AMENDED IN PROPOSED BILL FILED BY CONGRESSMEN ASHLEY AND OTTINGER

1. Subsection (5) to read as follows: "The responsible agency shall not approve a proposed merger transaction unless it finds that such transaction will be in the public interest, taking into consideration the effect of the transaction on competition (including any tendency toward monopoly) and the importance of protecting the public against bank insolvency. In determining the effect on competition and the likelihood of insolvency, the agency shall take into account the following factors, among others:

"(A) The financial history and condition of each of the banks involved;

"(B) The adequacy of their capital structure;

"(C) Their future earnings prospects;

"(D) The general character of their management; and

"(E) The convenience and needs of the communities to be served."

2. Subsection (7) to read as follows:

"(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

"(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of

the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

"(C) Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), but nothing in this subsection shall exempt any bank resulting from a merger transaction from complying with the antitrust laws after the consummation of such transaction."